

---

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

---

In re DOW CORNING CORPORATION,	)	
	)	
Debtor	)	
-----	)	Appeal from the United
HEIDI LINDSEY, et al.,	)	States District Court for
	)	the Eastern District of
Plaintiffs,	)	Michigan, Southern Division
	)	
OFFICIAL COMMITTEE OF TORT	)	
CLAIMANTS,	)	
	)	
Plaintiffs-Appellees,	)	No. 95-CV-72397-DT
	)	
v.	)	
	)	
O'BRIEN, et al.,	)	
	)	
and	)	Hon. Denise Page Hood,
	)	<u>District Judge</u> , Presiding
DOW CORNING CORPORATION, et al.,	)	
	)	
Defendants-Appellants.	)	

---

**REPLY BRIEF OF APPELLANTS**  
**DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY,**  
**AND CORNING INCORPORATED**

---

Herbert L. Zarov  
James C. Schroeder  
Theresa A. Canaday  
MAYER, BROWN & PLATT  
190 S. LaSalle Street  
Chicago, IL 60603-3441  
(312) 782-0600

Attorneys for The Dow  
Chemical Company

William D. Eggers  
NIXON HARGRAVE DEVANS  
& DOYLE LLP  
P.O. Box 1051  
Clinton Square  
Rochester, NY 14603  
(716) 263-1000

Attorneys for Corning  
Incorporated

Barbara J. Houser  
George H. Tarpley  
SHEINFELD, MALEY & KAY P.C.  
1700 Pacific Avenue, Suite 4400  
Dallas, TX 75201-4618  
(214) 953-0700

Attorneys for Dow Corning  
Corporation

December 8, 1995

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION . . . . .	1
I. THE DISTRICT COURT HAD JURISDICTION UNDER § 1334(b). . . . .	5
A. A "Conceivable" Effect On A Bankruptcy Estate Is All That Is Required To Establish Jurisdiction. . . . .	5
B. The Litigation Against The Shareholders -- All Involving Dow Corning's Products -- Is Likely To Affect Dow Corning's Bankruptcy In Several Ways. . . . .	9
II. CLAIMS THAT MAY AFFECT A BANKRUPTCY CASE CAN BE TRANSFERRED UNDER 28 U.S.C. § 157(b)(5) TO THE DISTRICT COURT IN WHICH THE BANKRUPTCY IS PENDING. . . . .	15
III. THERE IS NO BASIS FOR MANDATORY ABSTENTION. . . . .	20
CONCLUSION . . . . .	25

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<u>A.H. Robins Co. v. Piccinin</u> , 788 F.2d 994 (4th Cir. 1986), <u>cert. denied</u> , 479 U.S. 876 (1986) . . . . .	17, 22
<u>Acolyte Elec. Corp. v. City of New York</u> , 69 B.R. 155 (Bankr. E.D.N.Y. 1986), <u>aff'd</u> , 1987 WL 47763 (E.D.N.Y. Mar. 27, 1987) . . . . .	22
<u>American Hardwoods, Inc., In re</u> , 885 F.2d 621 (9th Cir. 1989) . . . . .	7, 9
<u>Baumgart v. Fairchild Aircraft Corp.</u> , 981 F.2d 824 (5th Cir.), <u>cert. denied</u> , 113 S. Ct. 2963 (1993) . . . . .	16
<u>Blue Diamond Coal Co., In re</u> , 163 B.R. 798 (Bankr. E.D. Tenn. 1994) . . . . .	8
<u>Borne v. New Orleans Health Care, Inc.</u> , 116 B.R. 487 (E.D. La. 1990) . . . . .	23
<u>Calumet Nat'l Bank v. Levine</u> , 179 B.R. 117 (N.D. Ind. 1995) . . . . .	16, 20
<u>Celotex Corp. v. Edwards</u> , 115 S. Ct. 1493 (1995) . . . . .	8, 9
<u>City of Waco v. United States Fidel. &amp; Guar. Co.</u> , 293 U.S. 140 (1934) . . . . .	5
<u>Coar v. National Union Fire Ins. Co.</u> , 19 F.3d 247 (5th Cir. 1994) . . . . .	9
<u>Connecticut Nat'l Bank v. Germain</u> , 503 U.S. 249 (1992) . . . . .	18, 19
<u>Cuyahoga Equip. Corp., In re</u> , 980 F.2d 110 (2d Cir. 1992) . . . . .	24
<u>Georgou, In re</u> , 157 B.R. 847 (N.D. Ill. 1993) . . . . .	23
<u>Hughes, In re</u> , 98 B.R. 115 (Bankr. D.D.C. 1988) . . . . .	21
<u>J.D. Marshall Int'l, Inc. v. Redstart, Inc.</u> , 74 B.R. 651 (N.D. Ill. 1987) . . . . .	22, 23, 25
<u>Joshua Slocum, Ltd., In re</u> , 109 B.R. 101 (E.D. Pa. 1989) . . . . .	23

**Cases**

**Page(s)**

Lynch v. Johns Manville Sales Corp., 710 F.2d 1194  
(6th Cir. 1983) . . . . . 17, 19

MacDonald Assocs., Inc., In re, 54 B.R. 865  
(Bankr. D.R.I. 1985) . . . . . 14

Marcus Hook Development Park, Inc., In re,  
943 F.2d 261 (3d Cir. 1991) . . . . . 7, 10

Melamed v. Lake County Nat'l Bank, 727 F.2d 1399  
(6th Cir. 1984) . . . . . 24

Michigan Real Estate Ins. Trust, In re, 87 B.R. 447  
(E.D. Mich. 1988) . . . . . 24

Nationwide Roofing & Sheet Metal, Inc., In re,  
130 B.R. 768 (Bankr. S.D. Ohio 1991) . . . . . 22

Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984) . . . . . 6, 7, 10, 11

Pan Am. Corp., In re, 16 F.3d 513 (2d Cir. 1994) . . . . . 16

Pan Am. Corp., In re, 950 F.2d 839 (2d Cir. 1991) . . . . . 20

Patterson v. Shumate, 504 U.S. 753 (1992) . . . . . 19

Petrolia Corp., In re, 79 B.R. 686 (Bankr. E.D. Mich. 1987) . . . . . 24

Rainbow Sec. Inc., In re, 173 B.R. 508  
(Bankr. M.D.N.C. 1994) . . . . . 8

Robinson v. Michigan Consol. Gas Co.,  
918 F.2d 579 (6th Cir. 1990) . . . . . 6

Rodriguez v. Pacificare of Texas, Inc., 980 F.2d 1014  
(5th Cir.), cert. denied, 113 S. Ct. 2456 (1993) . . . . . 24

Salem Mortgage Co., In re, 783 F.2d 626 (6th Cir. 1986) . . . . . 6, 7, 10

Sanders Confectionery Prods., Inc. v. Heller  
Fin., Inc., 973 F.2d 474 (6th Cir. 1992),  
cert. denied, 113 S. Ct. 1046 (1993) . . . . . 6, 9

Tidwell v. Omni Petrol., Inc., 164 B.R. 188 (M.D. Ga. 1994) . . . . . 25

Time Constr., Inc., In re, 43 F.3d 1041 (6th Cir. 1995) . . . . . 6

**Cases**

**Page(s)**

United States Lines, Inc., In re, 128 B.R. 339 (S.D.N.Y. 1991). . . 16

United States v. Dos Cabezas Corp., 995 F.2d 1486  
(9th Cir. 1993) . . . . . 22

United States v. Ron Pair Enters., Inc.,  
489 U.S. 235 (1989) . . . . . 18

Van Meter v. State Farm Fire & Cas. Co.,  
1 F.3d 445 (6th Cir. 1993) . . . . . 5

Walker, In re, 51 F.3d 562 (5th Cir. 1995) . . . . . 24

White Motor Credit, In re, 761 F.2d 270 (6th Cir. 1985) . . . 17, 21

Wieboldt Stores, Inc. v. Schottenstein, 111 B.R. 162  
(N.D. Ill. 1990) . . . . . 24

Wolverine Radio Co., In re, 930 F.2d 1132  
(6th Cir. 1991), cert. denied,  
503 U.S. 978 (1992) . . . . . 6, 7, 10

Wood, In re, 825 F.2d 90 (5th Cir. 1987) . . . . . 7

Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159  
(7th Cir. 1994) . . . . . 24

<u>Statutes</u>	<u>Page(s)</u>
11 U.S.C. § 362 . . . . .	18
28 U.S.C. § 157 . . . . .	18, 19
28 U.S.C. § 157(b)(2)(B) . . . . .	19, 21
28 U.S.C. § 157(b)(4) . . . . .	21
28 U.S.C. § 157(b)(5) . . . . .	4, 15-20
28 U.S.C. § 1332 . . . . .	24
28 U.S.C. § 1334(b) . . . . .	1, 3, 6-11, 24, 25
28 U.S.C. § 1334(c)(2) . . . . .	20-22, 25
28 U.S.C. § 1367 . . . . .	24
28 U.S.C. § 1334 . . . . .	20, 24
28 U.S.C. § 1334(c)(1) . . . . .	21
28 U.S.C. § 1452(a) . . . . .	25
28 U.S.C. § 1334(d) . . . . .	21
28 U.S.C. § 1367(a) . . . . .	24

**Other Authorities**

Douglas G. Baird, <u>The Elements of Bankruptcy</u> (1992) . . . . .	12
--	----

## INTRODUCTION

For the last decade, the animating principle behind this Court's § 1334(b) jurisprudence has been that the jurisdiction granted by that statute is exceptionally broad. Time and again, this Court has emphasized the expansive scope of "related to" jurisdiction in bankruptcy cases. See Debtor Br. 15-16.<sup>1/</sup> The district court, however, followed a markedly different approach in refusing to transfer the claims against Dow Corning's Shareholders; it construed its "related to" jurisdiction as narrowly as possible.

Evidently aware that the district court's jurisdictional ruling rests on shaky ground, the appellees have made a number of arguments intended, it seems, to divert this Court's attention from the principal issue: whether it is conceivable that continued litigation against Dow Corning's Shareholders -- concerning a product designed, manufactured, and sold by Dow Corning -- might have an effect on Dow Corning's bankruptcy. We will begin, therefore, by clearing away some of this underbrush before turning to the scope of "related to" jurisdiction under § 1334(b).

1. The biggest red herring in the appellees' briefs is the notion, stated repeatedly, that Dow Corning is attempting to shield its Shareholders from tort liability through "a de facto nationwide injunction" of the claims against the Shareholders. TC Br. 2. That is not so. Rather, in recognition of the significant impact that those

---

<sup>1/</sup> The briefs cited in this reply brief are designated as follows: our opening brief is referred to as "Debtor Br.," the brief from the Official Committee of Tort Claimants is cited as "TC Br.," the brief filed on behalf of claimants represented by the O'Quinn law firm is referred to as "O'Quinn Br.," and the amicus brief filed by the California plaintiffs is cited as "Cal. Br."

claims -- all based on allegedly defective Dow Corning products -- could have on Dow Corning's reorganization efforts, Dow Corning is simply attempting to keep the claims against it and its Shareholders together in one federal court so that this massive litigation can be coordinated in a sensible and economical fashion. That is the only way to maximize the assets in Dow Corning's estate and optimize the chances for a successful reorganization, while at the same time resolving Dow Corning's contingent breast implant liabilities comprehensively and equitably.<sup>2/</sup>

This would not, as the appellees assert, bring the cases to a grinding halt. On the contrary, discovery and other pre-trial activities could continue in a coordinated, coherent fashion. To be sure, keeping all of the cases together will prevent the threat of scores of simultaneous trials. But this is likely to facilitate resolution of the cases, not impede it. A single judge in control of all of the cases could ensure an orderly scheduling of trials so that the burden of defending them does not become overwhelming. Even more importantly, that judge would also be in the best position to devise means of resolving, in a single proceeding, issues common to multiple cases.

All of this would go a long way to avoiding the dissipation of Dow Corning's assets that might otherwise result from massive, simultaneous, and uncoordinated litigation against its Shareholders.

---

<sup>2/</sup> The idea that the transfer motion is intended to benefit the Shareholders is belied by the vigorous support the motion received in the district court and in this Court from the Official Committee of Unsecured Creditors. That Committee is interested in an expeditious and successful reorganization, not in protecting the Shareholders from litigation. Yet it has consistently supported the motion to transfer the claims against the Shareholders.

If the claims against the Shareholders are not transferred, thousands of cases will proceed concurrently, in virtually every jurisdiction in the country, and any hope of resolving this enormous litigation in any sort of coordinated, economical fashion will evaporate. For this reason, among others, the MDL panel has recently transferred many cases against the Shareholders to Judge Pointer in the Northern District of Alabama for consolidated pretrial proceedings. And once those pretrial proceedings are concluded, the debtor's opportunity to have a common issues trial -- which can occur only in a federal forum -- will be maximized if this Court holds that the cases against the Shareholders are properly in federal court under § 1334(b).<sup>3/</sup>

2. A second mischaracterization is the California plaintiffs' position -- not shared by the remaining appellees (see TC Br. 8) -- that Judge Hood herself remanded all of the cases against the Shareholders back to state court. Cal. Br. 3, 5. She did not. Although the district court's September 12 order contains some language that could be misconstrued as a remand order, the body of the court's opinion makes its intent clear:

"Given this Court's ruling that it has no jurisdiction over the claims involving the Shareholders, those motions and/or orders to dismiss or sever the Debtor and/or remanding the claims to the state court should be addressed by the district court in which those claims are currently pending or by Judge Pointer if the case has been transferred to the MDL court."

R. 389, p. 24 (emphasis added). The court then, in effect, instructed

---

<sup>3/</sup> A ruling by this Court that there was no jurisdiction under § 1334(b) would undermine the MDL panel's considered view that the cases against the Shareholders should be kept in one forum. The MDL panel is in the best position to consider the national impact of the thousands of cases pending against the Shareholders.

other district courts that "[c]laims against the non-debtors shall be remanded to state courts if the only basis for removal is the Court's 'related to' jurisdiction." Id. at 26. In short, the September 12 order transferred the cases against the Shareholders back to various district courts, and purported to tell those courts how to rule on remand motions, but the order did not send the cases directly to state courts. If there were any doubt about this, it was dispelled by the MDL panel which -- in recently transferring virtually all of the cases at issue here from the district courts around the country to Judge Pointer -- rejected the same argument the California plaintiffs make here.

3. Another straw man erected by the California plaintiffs -- but not by any other appellees -- is the contention that this Court lacks appellate jurisdiction because orders remanding cases to state courts are not appealable. Cal. Br. 2-7. But this is not an appeal of a remand order. First, as just explained, Judge Hood did not remand the cases to state courts, and therefore the limits on the appealability of remand orders do not apply here. Second, even if the district court had remanded the cases, the motion resolved in the September 12 order from which we are appealing was a motion to transfer under 28 U.S.C. § 157(b)(5). And the courts of appeals have held unanimously that a ruling on a motion to transfer under § 157(b)(5) is immediately reviewable -- a proposition not disputed by any appellee. See Debtor Br. 2; see also City of Waco v. United States Fidel. & Guar. Co., 293 U.S. 140, 143 (1934) (there is appellate jurisdiction over an order dismissing a complaint, even though the district court also remanded

the case to state court). In any event, this Court has the discretion to treat the notices of appeal here as a mandamus petition. Van Meter v. State Farm Fire & Cas. Co., 1 F.3d 445, 451 n.3 (6th Cir. 1993).

4. One group of appellees asserts that the district court's jurisdictional ruling must be reviewed under the clearly erroneous standard because Judge Hood supposedly "had to resolve numerous fact issues in order to resolve the jurisdictional issue." O'Quinn Br. 20. Nonsense. Judge Hood's ruling turned entirely on her view of the pertinent legal issues; she did not even mention, much less resolve, any disputed factual issues that affected her decision on jurisdiction. R. 389, pp. 20-24. Accordingly, that decision is subject to de novo review, as the other appellees concede.

5. Finally, it is not true that Dow Chemical and Corning "have no standing to appeal." O'Quinn Br. 5. The appellees pointedly ignore the fact, cited in our opening brief, that both companies expressly joined in Dow Corning's motion to transfer and argued in support of that motion in the district court. R. 185, pp. 1-2; R. 190, p. 3; R. 410, pp. 48-57, 260-62.

**I. THE DISTRICT COURT HAD JURISDICTION UNDER § 1334(b).**

**A. A "Conceivable" Effect On A Bankruptcy Estate Is All That Is Required To Establish Jurisdiction.**

The overriding theme of the appellees' argument on jurisdiction is that this Court has not meant what it said in holding, repeatedly, that § 1334(b) provides jurisdiction over any claims that could "conceivably" have an effect on the bankruptcy estate. E.g., In re Time Constr., Inc., 43 F.3d 1041, 1045 (6th Cir. 1995); Robinson v.

Michigan Consol. Gas Co., 918 F.2d 579, 583 (6th Cir. 1990). The appellees would construe "conceivable" as meaning "certain." See TC Br. 22, 26 (arguing that contribution claims and the joint insurance do not establish jurisdiction because there is no "automatic" effect on the estate).

But if this Court had meant "certain," it would have said so. And this Court's decisions under § 1334(b) would not contain, as they do, unequivocal statements that certainty of an impact on the bankruptcy is not required to establish "related to" jurisdiction; "conceivable" really does mean "conceivable." In re Wolverine Radio Co., 930 F.2d 1132, 1143, 1145 (6th Cir. 1991) (even though the non-debtors' dispute "may ultimately have no effect on the debtor," there was "related to" jurisdiction because a judgment that "might" result from the non-debtors' dispute could result in an indemnity claim that "could" affect the estate); In re Salem Mortgage Co., 783 F.2d 626, 634-35 (6th Cir. 1986) (jurisdiction under § 1334(b) exists because non-debtor investors "may" sue the debtors; "a finding of definite liability of the estate" is not a "condition precedent to holding an action related to a bankruptcy"). See also Sanders Confectionery Products, Inc. v. Heller Financial, Inc., 973 F.2d 474, 482 (6th Cir. 1992).

Thus, while Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984), holds that "related to" jurisdiction is not established by "potential" effects on a debtor's estate (TC Br. 14), that approach is flatly inconsistent with this Court's precedent. And the appellees' efforts to reconcile Pacor with this Court's decisions (TC Br. 14-16, 18-19) are simply contrary to what the Court actually held in Wolverine Radio

and Salem Mortgage, as shown above. This Court has not merely "distinguished Pacor on its facts" (TC Br. 14); it has charted a fundamentally different course in giving effect to the "extraordinarily broad," Salem Mortgage, 783 F.2d at 634, grant of jurisdiction contained in § 1334(b).

There is, moreover, an even more fundamental problem with the appellees' reliance on Pacor: the Third Circuit itself has backed away from the interpretation of Pacor that the appellees advance here. In fact, the author of Pacor (Judge Garth) has joined in an opinion that endorses this Court's decision in Wolverine Radio and holds that the "conceivable" test means that

"[c]ertainty, or even likelihood is not a requirement. In re Wolverine Radio Co., 930 F.2d at 1143. Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact on 'the debtor's rights, liabilities, options, or freedom of action' or the 'handling and administration of the bankrupt estate.'"

In re Marcus Hook Development Park, Inc., 943 F.2d 261, 264 (3d Cir. 1991) (emphasis added).

Other courts, too, hold that the "conceivable" standard means that actions involving non-debtors that may affect a bankruptcy are within federal jurisdiction under § 1334(b). See Debtor Br. 19-20, 22-23. Appellees' argument that some of these cases involved certain impacts on a bankruptcy (TC Br. 19-20) is plainly wrong. See Debtor Br. 22 (discussing In re Wood, 825 F.2d 90, 94 (5th Cir. 1987), and In re American Hardwoods, Inc., 885 F.2d 621, 624 (9th Cir. 1989), both holding that "related to" jurisdiction exists when third-party actions

might affect the bankruptcy estate).<sup>4/</sup>

Most importantly, the appellees' narrow view of "related to" jurisdiction is also inconsistent with the Supreme Court's decision in Celotex Corp. v. Edwards, 115 S. Ct. 1493 (1995). Although appellees assert that "some impact on the estate" there "was beyond dispute" (TC Br. 20 n.8), the Court's decision indicates otherwise. See 115 S. Ct. at 1500 ("related to" jurisdiction established where, if suits against the debtor's sureties proceeded, (a) the sureties "`would seek to lift the Section 105 stay to reach Debtor's collateral," (b) triggering actions by debtor to preserve its rights, (c) both of which "`could completely destroy any chance of resolving the prolonged insurance coverage disputes," and (d) settlement of the insurance disputes "`may well be the linchpin of Debtor's formulation of a feasible plan'") (emphasis added).

What we have already said largely disposes of the appellees' related argument (TC Br. 14-20) that only a direct effect on a bankruptcy estate can establish jurisdiction under § 1334(b). The case law is replete with decisions in which courts have held that actions involving non-debtors may indirectly, through a series of events, affect a bankruptcy estate. Besides Celotex, discussed above, the best example may be Coar v. National Union Fire Ins. Co., 19 F.3d 247, 248

---

<sup>4/</sup> See also In re Rainbow Sec. Inc., 173 B.R. 508, 511-12 (Bankr. M.D.N.C. 1994) (§ 1334(b) jurisdiction exists where "the outcome of the third-party action will determine which party to the third-party action will be a creditor of the estate," which "could have a significant effect" on the estate, since the estate "might very well have defenses" against some parties that it would not have against others) (emphasis added); In re Blue Diamond Coal Co., 163 B.R. 798, 806 (Bankr. E.D. Tenn. 1994) (there is "related to" jurisdiction over a third-party dispute that "may affect the amount of Cumberland's claim against [the debtor]") (emphasis added).

(5th Cir. 1994), where the Fifth Circuit affirmed a decision that a suit between a tort claimant and the debtor's insurer was "related to" the debtor's bankruptcy because of "the possibility" that various legal issues "might all be decided in such a way as to affect the bankruptcy estate." (Emphasis added.) The Coar court held that there was jurisdiction under § 1334(b) even though the bankruptcy estate would be affected by the third-party suit at issue only if a series of contingencies occurred: (a) recovery by the tort claimant against the insurer; (b) a determination that the insurance policy was the property of the estate; (c) a decision that Alabama law applied; and (d) if Alabama law applied, the possible imposition of punitive damages of \$5 million to \$15 million per death, with policy limits of only \$50 million. Id. See also, e.g., Sanders, 973 F.2d at 482; American Hardwoods, 885 F.2d at 624.

In short, to establish jurisdiction under § 1334(b), the governing case law does not require that the impact on the estate be either certain or direct. It is enough that there is a "conceivable" effect on the estate. The claims against the Shareholders easily meet this test.

**B. The Litigation Against The Shareholders -- All Involving Dow Corning's Products -- Is Likely To Affect Dow Corning's Bankruptcy In Several Ways.**

As demonstrated in our opening brief, it is certainly "conceivable" that the claims against Dow Corning's Shareholders, concerning Dow Corning's products, will affect Dow Corning's bankruptcy in a number of respects. The appellees' arguments to the contrary are based principally on a restrictive view of § 1334(b) jurisdiction that

is not the law in this Circuit.

a. With respect to whether the Shareholders' contribution or indemnification claims against Dow Corning might have a "conceivable" impact on the bankruptcy case, the appellees rely primarily on Pacor (TC Br. 20-21), which held that potential indemnification claims did not establish "related to" jurisdiction unless the debtor was "automatically" subject to indemnification liability. 743 F.2d at 995. The Third Circuit, however, no longer requires "[c]ertainty, or even likelihood," Marcus Hook, 943 F.2d at 264, and in any event, this Court has squarely rejected Pacor's holding that § 1334(b) "require[s] a finding of definite liability of the estate as a condition precedent to holding an action related to a bankruptcy proceeding," Salem Mortgage, 783 F.2d at 635. Nor was this "dictum," as appellees contend (TC Br. 15 n.5); in both Salem Mortgage and Wolverine Radio, this Court held that third-party disputes that might result in suits against the debtor were related to the debtor's bankruptcy case. See Salem Mortgage, 783 F.2d at 634-35 (possible action for breach of contract)<sup>5/</sup>; Wolverine Radio, 930 F.2d at 1143 (possible indemnity claim). Thus, this Court's cases establish that even if there is not yet a judgment in the underlying suits, potential claims against the debtor suffice to establish "related to" jurisdiction. Other courts follow the same rule. See Debtor Br. 22-23.

In light of this Court's precedent, there is no doubt that the

---

<sup>5/</sup> Contrary to appellees' suggestion, the Salem Mortgage Court did not express its approval of the bankruptcy court's statement that "a binding agreement may be appropriate" in certain circumstances. See TC Br. 15 n.5; 783 F.2d at 634-35.

contribution and indemnification claims that will be pursued by the Shareholders in the event of judgments or settlements is enough to satisfy the test of having a "conceivable" impact on Dow Corning's bankruptcy. In fact, it is undisputed that the Shareholders have already asserted cross-claims against Dow Corning in suits concerning Dow Corning's implants. R. 257, p. 2. In contrast, no such cross-claims have been filed by 3-M, Baxter, or Bristol-Myers.

The appellees also argue that contribution claims, regardless of how they are created, never have an effect on the debtor's estate because they do not create liability. TC Br. 22-24; O'Quinn Br. 19-20. As far as we are aware, no court has ever adopted such a theory; certainly, appellees cite no such case. To the contrary, courts have held consistently that contribution and indemnity claims against a debtor have an effect on the size of the estate, the length of time bankruptcy proceedings are pending, and the debtor's ability to finally resolve its liabilities in the reorganization process. Debtor Br. 22-23. Appellees' theory is inconsistent even with Pacor, which held that at least automatic indemnifications will have an effect on the bankruptcy estate.

b. The appellees' lead argument concerning the joint insurance that Dow Corning shares with its Shareholders is that the insurance will only be depleted through a "chain of events." TC Br. 24-26. But as we have already demonstrated (pp. 8-9, supra), a direct impact on the debtor's estate is not a prerequisite for jurisdiction under § 1334(b). And it is well settled that a threat to a debtor's insurance proceeds is enough to establish "related to" jurisdiction. See Debtor

Br. 19-20; see also Douglas G. Baird, The Elements of Bankruptcy 190 (1992) (courts will stay actions against third parties when "the same insurance policy covers the debtor and codefendants. Actions against codefendants could reduce the total obligations of the insurer under the policy"). It is striking that appellees do not cite a single case supporting their argument on the joint insurance.

Moreover, the appellees present an incomplete and misleading view of the insurance issues. For starters, they limit their focus to "judgments" against the Shareholders (TC Br. 25), conveniently ignoring the Shareholders' defense expenses, which are also covered by the policies. See Debtor Br. 11. These defense costs, of course, will run into the millions and will be incurred even if the Shareholders are successful in every case against them.

Next, the appellees speculate that the Shareholders "are presumably looking to their separate primary insurance" before seeking recovery under the excess policies. TC Br. 25. This ignores the uncontested fact that Dow Chemical has already notified the insurers that it is asserting claims against the policies for breast implant claims that may reduce coverage otherwise available to Dow Corning. Furthermore, only some of the shared insurance is excess coverage; other shared insurance provides for joint primary coverage. Affidavit of Scott Adams, p. 2, R. 255, attached to Ex. 3. As for the general liability coverage, it is true that there are no aggregate limits, but there are per occurrence limits, something else that appellees do not mention. See TC Br. 26.

The appellees' contention that the bankruptcy court could prevent

the Shareholders from drawing down on the shared insurance is off the mark in two respects. First, it begs the question. It has not yet been settled in the Dow Corning bankruptcy whether the bankruptcy court has the power to prevent a co-insured from receiving proceeds of a jointly-held insurance policy while a co-insured debtor is in bankruptcy. The uncertainty as to how that issue will be resolved (in other litigation) is enough by itself to demonstrate a "conceivable" effect on Dow Corning's bankruptcy. See Debtor Br. 18-20. Second, appellees ignore the possibility that Dow Chemical will prevail on its contention that, under the joint insurance policies, its insurance claims may establish Dow Chemical's priority to the insurance proceeds. If Dow Chemical is correct, then even if the bankruptcy court had the power to prevent payments of insurance proceeds for the time being, that would serve only to delay the day of reckoning, for Dow Chemical would have priority to the proceeds, whenever they are distributed.

In short, there is a risk that the district court's order, if not overturned, will eviscerate Dow Corning's insurance coverage. If thousands of cases against the Shareholders go forward simultaneously in an uncoordinated fashion, the Shareholders' defense costs alone -- which are bound to increase dramatically unless pretrial proceedings are conducted in one forum -- may significantly reduce the pool of coverage available to Dow Corning. The flood of future litigation promised by plaintiffs' lawyers, with all of its attendant costs, will only exacerbate the problem.

As a result, it is clear that the litigation against the Shareholders could "conceivably" have a significant impact of Dow Corning's insurance coverage and thus on its bankruptcy case.

c. The appellees blithely assert that collateral estoppel is an

"unrealistic" fear (TC Br. 29), but given what is at stake, Dow Corning cannot afford to be so sanguine. See Debtor Br. 24-25 (collecting cases indicating the risk of collateral estoppel).<sup>6/</sup>

And even if estoppel were not applicable, a finding of liability against one of the Shareholders on account of Dow Corning's products and conduct would, as a practical matter, have a substantial adverse impact on Dow Corning in the bankruptcy estimation proceedings, as well as on any settlement negotiations. In recent answers to interrogatories filed by the Tort Claimants' Committee in the Dow Corning bankruptcy proceeding, for example, the plaintiffs point to the recent \$14 million judgment against Dow Chemical in Nevada as evidence of the value of their claims against Dow Corning. In short, it is inconceivable that continued litigation against Dow Corning's products -- regardless of whether the named defendant is one of the Shareholders or the debtor -- will have no effect on the debtor's negotiations and ability to resolve the very same claims, involving the very same claimants, against the very same products in its bankruptcy.

d. The appellees also attempt to minimize the burden that continued litigation against the Shareholders would place on Dow Corning. But what is missing from the appellees' discussion is any acknowledgement of the unprecedented scope of this litigation; if the district court's order is not reversed, thousands of cases -- including

---

<sup>6/</sup> It is not necessarily true that collateral estoppel is limited to cases against the "debtor's officers and directors" in which the debtor had "an obligation to indemnify" the individual defendants. TC Br. 29 n.17. See, e.g., In re MacDonald Assocs., Inc., 54 B.R. 865, 869 (Bankr. D.R.I. 1985).

perhaps another 100,000 -- will go forward in an uncoordinated, helter-skelter fashion. Dow Corning's lawyers and employees had a significant involvement in the single post-bankruptcy trial that has thus far proceeded against a Shareholder. See Debtor Br. 30 n.12. The inevitable result if this procedure is followed in thousands of additional trials will be a crushing burden on Dow Corning that is bound to frustrate the very purposes that are supposed to be served by filing for reorganization under the Bankruptcy Code.

**II. CLAIMS THAT MAY AFFECT A BANKRUPTCY CASE CAN BE TRANSFERRED UNDER 28 U.S.C. § 157(b)(5) TO THE DISTRICT COURT IN WHICH THE BANKRUPTCY IS PENDING.**

The appellees make an extraordinary argument about a district court's ability to transfer claims that affect a bankruptcy case: they contend that district courts have no power to transfer any claims involving non-debtors under 28 U.S.C. § 157(b)(5). TC Br. 33-40. In other words, even if it is beyond question that claims against third parties will have an effect on a bankruptcy case -- say, by dissipating insurance proceeds that would otherwise be available to the estate -- a district court still would have no authority to transfer such a case to the bankruptcy court under the appellees' theory. Rather, a district court would have the power to transfer only claims asserted directly against the debtor.

No court, not even the district court here, has ever adopted such an extreme limitation on the power to transfer. Indeed, if this Court were to adopt the approach suggested by appellees, there would be no opportunity in mass tort litigation (or in many other bankruptcy cases) to achieve a prompt, fair, and complete resolution of all claims that

are related to a bankruptcy.

Appellees begin by noting that § 157(b)(5) does not use the word "transfer." TC Br. 33. That is true. But it is well settled that the statutory language giving a district court the power to "order" where personal injury claims "shall be tried" necessarily includes the power to transfer those claims to the appropriate federal court. In re Pan Am. Corp., 16 F.3d 513, 516 (2d Cir. 1994); Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824, 833 (5th Cir. 1993); Calumet Nat'l Bank v. Levine, 179 B.R. 117, 120-21 (N.D. Ind. 1995). Without the power to transfer, a district court would be powerless to enforce the venue determination mandated by § 157(b)(5).

The appellees then assert that § 157(b)(5) "is a venue-setting provision for personal injury tort cases against the debtor." TC Br. 34. But the only case that appellees cite on this point, In re United States Lines, Inc., 128 B.R. 339 (S.D.N.Y. 1991), says nothing of the sort. That court ruled only that claims pending in state court could not be transferred to federal court under § 157(b)(5) -- a holding that is no longer good law, having been rejected by the Second Circuit. See Pan Am., 16 F.3d at 516 ("the plain language" of § 157(b)(5) "authorize[s]" the transfer of cases from state court to federal court); Calumet Nat'l Bank, 179 B.R. at 122 n.7 (same).

In fact, the existing precedent is exactly contrary to the appellees' argument. It has been well settled for a decade that personal injury claims "related to" a bankruptcy may be transferred under § 157(b)(5), even though those claims are not "against the

debtor." See, e.g., A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1010 (4th Cir. 1986) (affirming an order transferring claims against non-debtors to the district in which the bankruptcy was pending; "[u]nquestionably" the district court "had the power under [§ 157(b)(5)] to fix the trial venue in its district for all Dalkon Shield cases").<sup>2/</sup> Indeed, if transfer of related claims were not permitted, there would be little point in having courts decide whether a suit involving non-debtors was "related to" a bankruptcy case; that exercise only makes sense if a court can do something if the cases are related, like ordering a transfer.<sup>3/</sup>

Besides being unsupported by precedent, the appellees' theory is inconsistent with the language of the statute as well. Most significantly, appellees would rewrite § 157(b)(5), which grants

---

<sup>2/</sup> The appellees' contention that the Robins court did not order the transfer of claims against non-debtors (TC Br. 36-38) is meritless. The Fourth Circuit unequivocally upheld a district court's authority to order the transfer of "all actions related to the Robins' Chapter 11 case now pending in any federal district court or subsequently removed," including claims against non-debtors. 788 F.2d at 998. Moreover, even appellees admit that courts in other cases have rendered similar rulings concerning the power to transfer claims against non-debtors. TC Br. 11, 34.

<sup>3/</sup> In re White Motor Credit, 761 F.2d 270 (6th Cir. 1985), is not to the contrary. The Court's statement that the non-debtor defendants there "cannot be transferred out of the jurisdiction[s] they are now in," id. at 273-74, was nothing more than a reflection of the fact that the claims against the other defendants, in cases arising out of motor vehicle accidents, were not related to the debtor's bankruptcy. The claims against the co-defendants in White Motor simply were not intertwined with the debtor's reorganization efforts like the claims against the Shareholders here, which are based on products made by Dow Corning. Nor did the co-defendants have such a relationship with the debtor and the debtor's products in Lynch v. Johns Manville Sales Corp., 710 F.2d 1194 (6th Cir. 1983), which in any event involved the automatic stay of 11 U.S.C. § 362, not a motion to transfer.

district courts the authority to set the venue for trials of "personal injury tort and wrongful death claims"; appellees would add on to the statutory language the phrase "against the debtor." This reading of § 157 is manifestly at odds with elementary rules of statutory construction.

The task of construing § 157(b)(5) must begin "with the language of the statute itself." United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989). And there is nothing in the wording of § 157(b)(5) to support the view that a district court's power to set trial venues for personal injury claims is somehow limited to claims asserted against the debtor. The phrases "against the debtor" and "against the estate" are nowhere to be found in § 157(b)(5). Rather, that section refers broadly to all personal injury claims within the bankruptcy jurisdiction. Thus, while claims filed against the estate are part of the universe of claims encompassed by § 157(b)(5), they by no means exhaust that section's reach. In short, the statute itself is unambiguous, meaning that "`judicial inquiry is complete.'" Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992). In this situation, "`the sole function of the courts is to enforce [the statute] according to its terms.'" Ron Pair, 489 U.S. at 241. The legislative history (which in any event does not indicate that Congress even thought about the types of issues raised by this case) is thus irrelevant. Connecticut Nat'l Bank, 503 U.S. at 254.

The appellees, however, contend that because Congress referred elsewhere in § 157 to personal injury claims "against the estate," it must have intended to apply this same limiting qualification to the

district court's powers under § 157(b)(5). TC Br. 34 (quoting § 157(b)(2)(B)). But basic rules of statutory construction mandate precisely the opposite conclusion. That Congress qualified personal injury claims in one section but not in another demonstrates only that "Congress, when it desired to do so, knew how to restrict the scope of" personal injury claims. Patterson v. Shumate, 504 U.S. 753, 758 (1992) (emphasis added). See also Lynch, 710 F.2d at 1197-98 (it is "particularly appropriate" in construing the Bankruptcy Act to apply the "fundamental rule of statutory construction that inclusion in one part of a congressional scheme of that which is excluded in another part reflects a congressional intent that the exclusion was not inadvertent"). Here, Congress clearly elected not to place in § 157(b)(5) the same limitation that it placed in § 157(b)(2)(B). Thus, the interpretation proffered by the appellees violates the "cardinal canon" of statutory construction, "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Connecticut Nat'l Bank, 503 U.S. at 253-54.

Given that the very purpose of § 157(b)(5) is to centralize claims related to the bankruptcy in one forum in order to facilitate reorganization, In re Pan Am. Corp., 950 F.2d 839, 845 (2d Cir. 1991); Calumet Nat'l Bank, 179 B.R. at 121, Congress's decision to subsume all "related to" claims under the statute's scope makes perfect sense. Section 157(b)(5) addresses the important question of where personal injury claims within § 1334 bankruptcy jurisdiction should be tried, it gives the district court where the bankruptcy is pending the

responsibility for making the decision, and it provides that court the opportunity to centralize claims where doing so is in the debtor's interest. Thus, Congress gave district courts the ability, in appropriate cases, to transfer all personal injury claims "related to" a bankruptcy because without this power, courts could not eliminate fragmented, duplicative, and wasteful litigation of "related to" claims, which inevitably harms the reorganization process.

There is no basis -- in precedent, logic, or the language of § 157(b)(5) -- to deprive district courts of the flexibility to consolidate all related claims in the district in which the bankruptcy is pending. Appellees' efforts to take that option away from district courts should be rejected.<sup>9/</sup>

### **III. THERE IS NO BASIS FOR MANDATORY ABSTENTION.**

The appellees further attempt to evade the expansive scope of "related to" jurisdiction by asserting that the district court would be required, under 28 U.S.C. § 1334(c)(2), to abstain from exercising jurisdiction over claims "that originated in state court and could not have been commenced in federal court." TC Br. 41. But mandatory abstention under § 1334(c)(2) does not apply here, for three independent reasons.<sup>10/</sup>

---

<sup>9/</sup> At one point, appellees, in passing, question whether there was adequate notice of the motion to transfer. TC Br. 18. This is, to say the least, surprising. The tort claimants and their counsel obviously had notice of the motion to transfer; they filed more than 100 separate responses to the motion and participated fully in oral argument (R. 410, pp. 58-194).

<sup>10/</sup> Nor is there any merit to the appellees' argument that if this Court reverses, the district court should be given the opportunity to consider discretionary abstention under § 1334(c)(1). TC Br. 39-40. The district court has already indicated, in no uncertain terms, that  
(continued...)

First, "personal injury cases," like those at issue in all of the breast implant litigation, "are not subject to this mandatory abstention provision." White Motor Credit, 761 F.2d at 272 (emphasis added). Accord In re Hughes, 98 B.R. 115, 119 (Bankr. D.D.C. 1988) ("mandatory abstention [is] inapplicable to this action," which involved personal injury and wrongful death claims against debtor and non-debtor).<sup>11/</sup>

Second, because there are thousands of breast implant claims --

---

<sup>10/</sup>(...continued)  
it will not abstain:

"As to the issue of federal jurisdiction, in the event that the Sixth Circuit reverses this Court's finding and holds that the Court does have jurisdiction over Dow Chemical and Corning, Inc., the Court will thereafter assume jurisdiction over the claims against Dow Chemical and Corning, Inc. pursuant to 28 U.S.C. § 1334(b), the Court's 'related to' jurisdiction."

R. 405, p. 2 (emphasis added). Appellees' argument on discretionary abstention ignores the clear thrust of this statement by the district court. See also R. 389, pp. 12-20; R. 388, p. 6 (refusing to abstain under § 1334(c)(1) for claims involving the debtor or claims against the non-debtors). In addition, the court's refusal to exercise its discretion to abstain under § 1334(c)(1) cannot be reviewed on appeal. 28 U.S.C. § 1334(d).

<sup>11/</sup> The White Motor Court relied on 28 U.S.C. §§ 157(b)(2)(B) and (b)(4). Section 157(b)(4) states that all non-core proceedings under § 157(b)(2)(B) "shall not be subject to the mandatory abstention provisions." Section 157(b)(2)(B), in turn, provides that liquidation or estimation of "personal injury tort or wrongful death claims against the estate" are non-core proceedings. This language embraces personal injury and wrongful death claims brought directly against Dow Corning as well as claims brought indirectly against the estate, i.e., claims concerning Dow Corning products brought against Dow Chemical and Corning, both of which will pursue contribution or indemnity claims against Dow Corning. See, e.g., Robins, 788 F.2d at 999 (when a third party may seek indemnity from a debtor in connection with a claim made against the third party, "the debtor may be said to be the real party defendant and . . . a judgment against the third-party defendant will in effect be a judgment or finding against the debtor"); United States v. Dos Cabezas Corp., 995 F.2d 1486, 1491 n.3 (9th Cir. 1993) (same). In both of these cases, the courts affirmed stays of actions against third parties that were sufficiently linked with the debtor; the same reasoning means that mandatory abstention does not apply either.

with tens of thousands of new cases likely in the near future, see Debtor Br. 8 n.4 -- these claims cannot possibly be "timely adjudicated" in state court, as required by § 1334(c)(2) itself. The principal purpose of the "timely adjudicat[ion]" requirement is to ensure that state court litigation is not allowed to delay the administration of the bankruptcy or the debtor's ability to reorganize its business. J.D. Marshall Int'l, Inc. v. Redstart, Inc., 74 B.R. 651, 654-55 (N.D. Ill. 1987). And in considering this issue, as one must, from the standpoint of the impact on the debtor's bankruptcy, the Court in a mass tort case necessarily has to look at the tort claims as a group rather than focusing on any specific claim.<sup>12/</sup>

Thus, it is not relevant that any particular claim (or even a handful of claims) could be tried promptly in a given state court. The overwhelming majority of breast implant claims against the Shareholders are not set for trial (or anywhere near being ready for trial), and a

---

<sup>12/</sup> While the appellees (TC Br. 44) have cited one case actually holding that the removing party has the burden on whether timely adjudication will occur in state court, Acolyte Elec. Corp. v. City of New York, 69 B.R. 155, 180 (Bankr. E.D.N.Y. 1986), aff'd, 1987 WL 47763 (E.D.N.Y. Mar. 27, 1987), the great weight of authority is that this burden is more properly placed on the party seeking mandatory abstention. See, e.g., In re Nationwide Roofing & Sheet Metal, Inc., 130 B.R. 768, 779 (Bankr. S.D. Ohio 1991) (citing numerous cases); In re Georgou, 157 B.R. 847, 851 (N.D. Ill. 1993); In re Joshua Slocum, Ltd., 109 B.R. 101, 107 (E.D. Pa. 1989); Borne v. New Orleans Health Care, Inc., 116 B.R. 487, 493-94 (E.D. La. 1990). The appellees here have not met this burden.

resolution of all breast implant claims is necessary to enhance Dow Corning's ability to administer its estate and formulate a plan. The best way to accomplish that gargantuan task promptly and economically is to centralize the litigation in one forum, thus preserving the opportunity to coordinate discovery and resolve common issues in one proceeding, rather than thousands. The vast majority of states have not established any centralized coordination of breast implant suits in that state, and only a federal court has the power to coordinate these cases on a national level or resolve common issues in a single proceeding. As a result, if the claims against the Shareholders are scattered around the country for litigation, it may be upwards of a decade before the lawsuits are resolved. That would undermine, if not entirely obstruct, the central purpose of the bankruptcy scheme: to allow consolidation of all claims that may affect a bankruptcy in order to facilitate the debtor's ability to reorganize promptly. J.D. Marshall Int'l, 74 B.R. at 655 (where abstention could cause "serious and unnecessary delay in administration or liquidation of the estate," mandatory abstention is "inapplicable").

Third, for the claims involving the Shareholders to be subject to mandatory abstention, the appellees must demonstrate that an action with respect to those claims "could not have been commenced in a court of the United States" absent "related to" jurisdiction. 28 U.S.C. § 1334(c)(2). No such showing is possible. To begin with, these claims fall within the independent jurisdictional basis of 28 U.S.C. § 1367(a) (providing supplemental jurisdiction "over all other claims that are so related to claims" in an action already within the district court's

jurisdiction "that they form part of the same case or controversy").<sup>13/</sup>

In addition, the claims against the Shareholders could have been filed in federal court based on diversity of citizenship under 28 U.S.C. § 1332. That many plaintiffs may have named non-diverse parties in order to defeat diversity and frustrate removal (prior to Dow Corning's bankruptcy filing) is irrelevant to application of § 1334(c)(2). Like the bankruptcy removal statute, 28 U.S.C. § 1452(a), a claim-by-claim analysis is required by the mandatory abstention language in § 1334(c)(2) (referring to "a State law claim or State law cause of action . . . with respect to which an action could not have been commenced" in federal court absent jurisdiction under § 1334(b)) (emphasis added). See J.D. Marshall, Int'l, 74 B.R. at 654 ("`a district court must abstain from hearing a pure state law claim . . . where the claim can be timely adjudicated in state court'") (emphasis added); Macon Prestressed Concrete Co., 46 B.R. 727, 729 (M.D. Ga.

---

<sup>13/</sup> There can be no doubt that the claims involving Dow Corning are "related to" Dow Corning's reorganization proceedings. See, e.g., Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159, 161 (7th Cir. 1994). And the claims against the Shareholders -- based on the same alleged defects in Dow Corning's products that are alleged in the claims against Dow Corning -- are sufficiently related to the claims against the debtor to be part of the same "controversy." Melamed v. Lake County Nat'l Bank, 727 F.2d 1399, 1403 (6th Cir. 1984); In re Cuyahoga Equip. Corp., 980 F.2d 110, 115 (2d Cir. 1992); In re Petrolia Corp., 79 B.R. 686, 689-90 (Bankr. E.D. Mich. 1987). Indeed, the "broad grant" in § 1367(a) even provides jurisdiction for claims against parties over which the court would not have original jurisdiction. Rodriguez v. Pacificare of Texas, Inc., 980 F.2d 1014, 1018 (5th Cir. 1993).

Further, the appellees incorrectly contend that supplemental jurisdiction cannot apply here; courts have held regularly that district courts have supplemental jurisdiction in cases brought under § 1334. Cuyahoga Equip. Corp., 980 F.2d at 115; In re Michigan Real Estate Ins. Trust, 87 B.R. 447, 458 (E.D. Mich. 1988); Wieboldt Stores, Inc. v. Schottenstein, 111 B.R. 162, 166 (N.D. Ill. 1990). The appellees' reliance (TC Br. 32 n.20) on In re Walker, 51 F.3d 562 (5th Cir. 1995), is misplaced since Walker expressly limited its supplemental jurisdiction holding to bankruptcy courts, not district courts. Id. at 571-73.

1985) ("abstention would be mandatory if MPC's counterclaim could not have been commenced in this federal court" absent bankruptcy jurisdiction) (emphasis added), overruled on other grounds, Tidwell v. Omni Petrol., Inc., 164 B.R. 188 (M.D. Ga. 1994). Therefore, because the claims against the Shareholders could have been filed in federal court without regard to whether they are "related to" Dow Corning's bankruptcy case, they are not subject to mandatory abstention.

**CONCLUSION**

The district court's refusal to transfer the claims against the Shareholders should be reversed.

December 8, 1995

Respectfully submitted,

MAYER, BROWN & PLATT

SHEINFELD, MALEY & KAY, P.C.

By: \_\_\_\_\_  
Herbert L. Zarov  
James C. Schroeder  
Theresa A. Canaday

By: \_\_\_\_\_  
Barbara J. Houser  
George H. Tarpley

Attorneys for The Dow  
Chemical Company  
190 S. LaSalle St.  
Chicago, IL 60603-3441  
(312) 782-0600

Attorneys for Dow Corning  
Corporation  
1700 Pacific Avenue, Suite 4400  
Dallas, TX 75201-4618  
(214) 953-0700

NIXON HARGRAVE DEVANS & DOYLE LLP

By: \_\_\_\_\_  
William D. Eggers

Attorneys for Corning Incorporated  
P.O. Box 1051  
Clinton Square  
Rochester, NY 14603  
(716) 263-1000